SUPREME COURT, U. S.
No. 57
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

AGNES M. BANKS, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On April 17, 1967, the Court invited the views of the Solicitor General in this case, which is before the Court on a petition for a writ of certiorari filed by the representatives of a deceased longshoreman.

Petitioner filed a claim with the Department of Labor under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, alleging that her decedent had died as the result of a work-connected accident occurring on January 26, 1961.

The Department's deputy commissioner denied the claim. Later, petitioner filed a new claim, this time alleging an accident on January 30. The deputy commissioner sustained the second claim and awarded compensation. The district court upheld the award. The court of appeals reversed, holding that the deputy commissioner's ruling on the first claim was *res judicata*.

Petitioner was not a party in the courts below but the award was defended by the United States Attorney as provided in 33 U.S.C. 921a. When the government decided not to file a petition for a writ of certiorari (a decision reflecting doubt that the case had sufficient general importance to warrant review by this Court), petitioner filed her own petition for certiorari. At the same time, she sought leave to intervene in the district court, which denied her motion. She filed no notice of appeal from the district court's order, although her counsel did consult orally with the clerk and the chief judge of the court of appeals; the latter, according to counsel, informed him that an appeal would be futile because the court of appeals' mandate had already gone down and the court had lost jurisdiction of the case.

1. There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene

which she then filed was denied by the district court. On the other hand, the procedure whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individuals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari.[1]

2. Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 922, provides that

> upon the application of any party in interest, * * * because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to * * * one year after the rejection of a claim, review a compensation case * * * and * * * issue a new compensation order * * *.

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[1] Alternatively, if petitioner could be said to have perfected an appeal to the court of appeals from the order of the district court denying intervention, the petition could be viewed as seeking review not only of the court of appeals' judgment but also of the refusal to permit her to intervene. In that event, if the Court agreed that intervention was wrongly denied (and we can think of no sound reason for denying intervention to petitioner), it would be free also to consider the merits of the judgment below. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U.S. 129.

While neither petitioner nor the deputy commissioner specifically invoked Section 22 in the administrative proceedings, we believe that there is substantial basis for arguing that this provision precluded a finding of *res judicata* in the circumstances of this case. Petitioner's second claim was filed within "one year after the rejection of" her first claim for compensation benefits,[2] and constituted, in effect, a challenge to the previous finding of the deputy commissioner that the decedent's death was not work-connected.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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[2] See *Candado Stevedoring Corp.* v. *Willard*, 185 F. 2d 232, 233, where the Second Circuit stated: "That the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment."

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